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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

No. [redacted] 130.

S. W. ASHER,

Petitioner

v.

STATE OF INDIANA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. _____

S. W. ASHER;

Petitioner

v.

STATE OF INDIANA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioner respectfully asks this Court to issue a Writ of Certiorari to review the final judgment of the Supreme Court of Indiana which affirmed the judgment of a lower court finding petitioner guilty of the crime of robbery and sentencing him to an indeterminate term of not less than ten nor more than twenty five years in the Indiana State Penitentiary.

OPINION BELOW

The opinion of the Indiana Supreme Court in this cause is as yet unreported. The opinion is printed in the appendix hereto.

JURISDICTION

The decision of the Indiana Supreme Court affirming petitioner's conviction was rendered on February 3, 1969. Petitioner filed his petition for rehearing within the twenty days time provided on February 21, 1969 and the Indiana Supreme Court's decision became final on March 14, 1969 when it overruled petitioner's petition for rehearing.

The statutory provision believed to confer jurisdiction upon this Court is Title 28, United States Code, Section 1257(3).

QUESTION PRESENTED

Whether a criminal conviction based upon the uncorroborated testimony of an alleged accomplice constitutes a denial of an accused's right to procedural due process of law in view of the fact that the common law, at the time the Bill of Rights was adopted, prohibited an alleged accomplice from testifying at all unless and until his prior negotiations with and statements to the investigating officials were subjected to judicial scrutiny and the scrutiny was such that there was no such thing as an uncorroborated accomplice at common law.

CONSTITUTIONAL PROVISIONS INVOLVED

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life,*

liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (Emphasized portion is clause relied upon.)
Amendment V. Constitution of the United States

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property without due process of law,* nor deny to any persons within its jurisdiction the equal protection of the laws. (Emphasized portion is clause relied upon.)
Amend. XIV, Sec. 1, Const. of the United States

STATEMENT OF THE CASE

The petitioner was charged by affidavit with Robbery in the Criminal Court of Marion County, Indiana and upon a trial he was convicted and subsequently sentenced to a prison term of not less than ten nor more than twenty-five years. The nature of the case made against the Appellant at his trial was appropriately summarized in the dissenting opinion in the court below. (The majority opinion contained no detailed summary.)

> The State of Indiana in the case at bar parades a total of thirteen witnesses to the witness stand, only two of whom in any way connected appellant with the crime charged in the affidavit. One of these was Donnie Richey, the delinquent child boy friend of Ralph U. Brown, an admitted participant in the robbery at the Burger Chef, who was an escaped convict. Richey testified that appellant came to Brown's apartment about 12:00 o'clock on the night of April 26, 1964, after Willoughby and Brown had arrived and were in the other room, while he, Richey, stayed in the Kitchen and listened

to the radio. He testified he let Sam (Asher) in the apartment and Sam went into the other room with Willoughby and Brown. He testified he heard change being counted. This was the first time he saw Sam. The only other witness who placed appellant at the scene of the crime and accused him of planning or helping plan the robbery was Ralph U. Brown, an admitted participant, now serving time for this robbery, also for other prior offenses. It is from testimony of these two witnesses alone that a summary of the evidence most favorable to the State can be made. It appears as follows. The Burger Chef restaurant at 4904 South Madison Avenue in Indianapolis, Marion County, Indiana, was robbed by two gunmen at about 11:20 p.m. None of the employees of the Burger Chef saw or heard the vehicle in which the robbers came or in which they escaped. About an hour and a half later, at approximately 1:30 a.m. April 27, 1964, the police brought Ralph U. Brown and Donnie Richey to the Burger Chef, where Brown was immediately identified by all three employees as one of the robbers. When first confronted by the police, Brown told them his name was Robert Smith and gave them a fictitious address. Richey was present when Brown made these false statements but remained silent. Later Brown admitted his name and address, and signed a statement implicating the defendants Oie Willoughby and S.W. Asher in the stickup. According to Brown, he had known Willoughby since 1940 when he said they were prison mates at Pendleton, and had known Asher since about a week prior to the Burger Chef robbery. Brown's story was that Asher approached him with the suggestion they make some dishonest money together. Brown claimed he accepted Asher without question, introduced him to Willoughby, and together they discussed possible "scores". During the week prior to the robbery, according to Brown, Asher drove him around Indianapolis in his taxicab while they looked for and discussed possible targets

for a holdup. According to Brown's story Asher, Willoughby and he met at Brown's apartment on Virginia Avenue, on the evening of the holdup. They left the apartment between 10:00 and 10:30 and arrived at the Burger Chef about 10:30 or 11:00. They rode around in the cab and planned their getaway. The car was parked at the "television place" on Thompson Road about a half block from the Burger Chef. Asher remained in the cab while Willoughby and Brown walked to the Burger Chef, performed the robbery and then returned to the cab. Asher then drove the cab to an alley on Elm Street which led to Brown's apartment, where Willoughby and Brown got out of the cab and walked to the apartment. Brown's story was that when he and Willoughby arrived at his apartment his teen-age boy friend, Donnie Richey, was there playing records. Asher arrived ten or fifteen minutes later, went into another room where Brown and Willoughby were and they divided the money. Brown said he got $317.00, Willoughby got a third and Asher got a third. Willoughby and Asher then left. Richey denied knowing anything about the robbery or the division of money. After Asher and Willoughby had left the apartment Brown and Richey claimed they left the apartment and were walking southeast on Virginia towards a restaurant when they were stopped by the police. Both were returned to the scene of the robbery at the Burger Chef where Brown was positively identified as one of the robbers . . . . Asher took the stand in his own behalf and categorically denied knowing Brown or that he had ever been in his cab, he never met Brown until Carlisle brought him out and said "This is Brown,", that he knew nothing about the robbery at the Burger Chef, or that he had ever seen before the guns that were in evidence in the case. He testified he never owned a rifle or shotgun and never used a gun outside the army . . . . Marie Asher, wife of appellant, testified they were married December 16, 1963, that she was living with her husband on April 26,

1964, worked then at Fairmount Glass and had made arrangements for her husband to get a job there, that he was to come to work the following week and had given the cab company notice. That on the 26th day of April, 1964, she had worked at Fairmount Glass from three until 11:00, she was to pick up her husband in her car, a 1962 Oldsmobile, that she met her husband at the cab company. She was there when he checked in at about 11:30. "I had waited maybe fifteen minutes before S.W. came in." A man was waiting there to take his cab from him. She could not give his name because she didn't know it. Curtis Brown, the dispatcher, was also there. He is the man the money is turned in to and he assigns cab drivers to cabs. She met her husband at about 11:30 and he did not leave her after 11:30 nor did he leave the house. She had never seen her husband with $300.00 to his name since she married him, the most she had seen him with was $160.00 when he worked at Fairmount Glass and pulled doubles. She was in the court room when her husband offered to take a lie detector test. . . . James Lawson testified for the appellant. He was 20 years old, lived in an aprtment at 250 N. Reisner and was employed by Pennsylvania R.R. as a yard brakeman and had been with them for a year and a half. Lawson testified this was the third time he had seen Mr. Asher. The first time was about 11:00 p.m. Sunday, April 26, 1964, when he hailed his cab to take him to State and Washington Streets to the assistance of his landlady who had a flat tire there. He noticed Asher's picture, his name and number in the cab and asked if he was related to Wanda Asher. He replied yes, she was his niece. The witness had gone to school with the niece. Asher wrote his name and cab number on a piece of paper and gave it to the witness with the remark if he ever needed a cab to give his cab number and name. Asher pulled up next to Mary Blunk, the woman who had difficulty with her car, at 11:15. Nine days later the witness and some friends were in Walls Drug

Store at 1800 Washington when Asher approached him and asked if he remembered him, that he had been in his cab, and told him of his predicament, the witness replied that he remembered him, that he still had his name in his pocketbook and took it out and showed it to him. Curtis Brown, the night manager for Yellow Cab Company, testified in behalf of the appellant. He stated that his duties were to check cars in and out, and to collect money from the drivers and turn it over to the company. Brown testified that on the night of April 26, 1964, he checked appellant's car in at approximately 11:30 p.m. He stated that he was sure of the approximate time and date because appellant was quitting Yellow Cab Company that night, and it was necessary for Brown to check a new man in the cab appellant was driving. Brown reiterated this story on cross examination when he stated that he was sure of the time, "Because a guy was taking the cab over at midnight that night and he brought the cab in at 11:30." Defendant Willoughby took the stand and testified in his own defense. In a number of instances he directly contradicted the testimony of Ralph U. Brown, and the State failed to introduce any evidence or witnesses in rebuttal. Whereas Brown stated that he knew Willoughby in 1940 while imprisoned in the State Reformatory at Pendleton, Willoughby stated that he and Brown were not at Pendleton at the same time. He further testified that he first saw Brown in the court room during the trial of the case. Willoughby testified he had never seen Asher before in his life until the day he saw him in court in connection with the trial of this case.

Willoughby's attorney, Joseph Mazelin, testified that as attorney for defendant Willoughby he went to the Marion County Jail and talked to Ralph Ulmer Brown about the robbery. Mazelin stated that he did not know appellant prior to the trial. The following portion of his testimony dealing with his conversation with Brown is set out in question and answer form as it appears in the transcript.

Q. And you talked to Mr. Brown and asked what the facts were concerning the robbery and so forth?

A. I did.

Q. Tell the jury what he said to you.

A. I told him I wanted to talk to him about this robbery and asked him if he could tell me anything about it. He said, 'Well, Mazelin, I have committed so many robberies I don't even know half of them.'

Q. Tell the jury again what he said to you.

A. Well, I asked him how come he was making so many different stories about what occurred at this robbery and finally he said, 'Well, Mazelin, I have committed so many robberies and incidentally a couple where shooting was involved, I have been threatened if I don't testify against Willoughby they are going to charge me with all the charges as well as Habitual Criminal' but if he testified against Willoughby he would get ten years flat.

Q. And Habitual Criminal calls for life imprisonment, does it?

A. Yes, it does.

Q. Did he ever mention Asher's name being connected?

A. He never did."

The above-quoted portions of the dissent herein are very argumentative and obviously calculated to have persuasive effect. They have not been quoted for that purpose. They have been set forth only because the said-quoted portions of the dissent constitute the simplest device for presenting the pertinent facts in this cause.

REASONS FOR GRANTING WRIT

I.

The Practice of Permitting Convictions by Uncorroborated Accomplice Testimony Is of Relatively Recent Origin and Based Upon a Misconception of the Practice Which Prevailed at Common Law as of the Time the Bill Of Rights Was Adopted

At common law the question of the sufficiency of the testimony of an uncorroborated accomplice to convict a citizen accused of a felony was never considered. There are two reasons why this question never became a subject of consideration:

1. All considerations went to the admissibility of such evidence because testimony, when admitted, was not weighted.[1]

2. There was no such thing as *uncorroborated* accomplice testimony at common law as of the time that the Bill of Rights was enacted because

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[1] May a jury lawfully convict of a crime on the sole testimony of an accomplice in the alleged crime? Or must his single testimony be corroborated by other evidence? Historically this question did not become a mooted one until the end of the 1700's. Long before then, a struggle had centered around the testimony of accomplices, for in the political trials ever since the time of Henry VIII (when the frequent reports began) they appear as the chief dependance of the Crown on its prosecutions. But the original controversy was over their *admissibility*. Through the 1600s and the 1700s it had to be ruled again and again that they were to be received as witnesses. But for a long time no question was made as to the *sufficiency* of their testimony when admitted The quantitative conception of an oath tended to keep this question in the background. An oath, in the notions of the time, had a certain dead weight of its own; one oath was as good as another oath. Should a witness once get in, the harm (they thought) was done; for there would be little weighing of the comparative quality of different persons' oaths. The struggle, therefore, was made at the threshold. *7 Wigmore* 312, Sec. 2056 (3rd Ed. 1940)

the prevailing procedure required substantial corroboration before such testimony was admitted.[2]

Under the practice and procedure described in the authority set forth in footnote 2 there was no such thing as an uncorroborated accomplice as of 1775 and thereafter when the Bill of Rights became the law of the land. There was, in each case, substantial corroboration in the form of the following requirements:

A. An "approver" or would-be accomplice-witness could not become a candidate for such a rule unless independent evidence had caused him to be indicted for the subject offense prior to his offer to give testimony against another.

B. Such a prospective accomplice witness was required to volunteer every fact concerning his role in the offense and other offenses committed by him and any omission known to the authorities would disqualify him immediately.

C. The statement of such prospective accomplice then was subjected to an investigation by an independent officer to determine whether independent facts and

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[2] A person desiring to be an approver, must be one indicted of the offense, and in custody on that indictment. He must confess himself guilty of the offense, and desire to accuse his accomplices; he must likewise, on oath, discover, not only the particulars which he knows of; and after all this it is in the discretion of the court whether they will assign him a coroner, and admit him to be an approver or not: for if, on his confession it appears, that he is a principal, and tempted the others, the Court may refuse and reject him as an approver. When he is admitted as such, it must appear that what he has discovered is true; and that he has discovered the whole truth. For this purpose, the coroner puts his appeal into form; and when the prisoner returns into court he must repeat his appeal without any help from the Court or from any bystander. And the law is so nice that if he vary in a single circumstance, the whole falls to the ground and he is condemned to be hanged; much more if he fail in essentials. The same consequences follow if he does not discover the whole truth; and in all these cases the approver is convicted on his own confession. *Rex v. Rudd*, 91 Eng. 1114, 1116, 1117 (1775)

accounts were consistent or inconsistent with the proposed testimony.

D. Upon the recommendation of the said independent officer the proposed accomplice witness was required to repeat his entire account before magistrate without assistance or coaching and even the slightest discrepancy in his prior and present testimony resulted in his immediate disqualification.

The rule permitting conviction by uncorroborated accomplice evolved slowly during the nineteenth century with no decision meeting the issue head on.[3] This Court's decisions on the matter implied that convictions should be based upon accomplice testimony only where such testimony was corroborated but this Court contributed substantially to the departure from what had been the requirements of due process in the matter at common law at the time the Bill of Rights was enacted, by treating the question of whether corroboration was present as a question solely for the jury.[4] Present law merely requires that the jury be given a caveat to scrutinize such testimony closely in federal jurisdictions and in a minority of the states[5] including Indiana. In these

[3]The rule permitting conviction by uncorroborated accomplice where there was no inquiry into his competence evolved slowly during the 19th century and was never resolved in a decision meeting head-on the question of whether a conviction may be based upon the testimony of an alleged accomplice who is neither corroborated at the trial nor judicially scrutinized prior to his giving testimony. *Corroboration of Accomplice Testimony In Federal Criminal Cases,* Lester B. Orfield, 9 Villanova Law Review 15 (1963)

[4]On behalf of the defendant it is its (the court's) duty to caution the jury not to convict upon the uncorroborated testimony of an accomplice. Indeed, according to some authorities, it should peremptorily instruct that no verdict of guilty can be founded on such uncorroborated testimony, and this is because the inducements to falsehood on the part of an accomplice are so great. *Reagen v. United States,* 157 U.S. 301, 310, 15 S. Ct. 610, 613 (1895).

[5]The laws of most states contain outright prohibitions of criminal convictions based upon uncorroborated accomplice testimony or erect substantial barriers to the obtaining of such convictions. See: Ala-

jurisdictions the departure from the common law practice has become complete.

II.

Indiana's Law Regarding the Testimony of Uncorroborated Accomplices Is Based Upon an Erroneously Conceived Doctrine of Necessity Which Is a Departure from the Concept of Due Process of Law That Was Embodied in the Fifth Amendment and Made Applicable to the States Through the Fourteenth Amendment

Under the pertinent Indiana Statute an accomplice, however uncorroborated, becomes eligible to testify upon his consenting to do so.[6] This became the law in Indiana in 1852 on the theory that not permitting uncorroborated accomplice testimony would prevent convictions necessary to sound law enforcement.[7] The prior law in Indiana had

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bama: Code 1897, sec. 5300, c. 1902, sec. 7897, Code 1923, Sec. 4555; Alaska: Comp. L. 1913, sec. 2262, C.L. 1933, sec. 5352; Arizona: R.S. 1913 sec. 1051, R. C. 1928, 5055; Arkansas: Dig. 1919, sec. 3181, Pope's Dig. 1937, 4017; Georgia: Rev C. 1910, sec 5742, R.C. 1910, sec. 1017; California, P.C. 1872, sec. 1111; Canal Zone: C. Cr. P. 1934, sec. 387; Idaho: Comp. St. 1919, sec. 8957, Code, 1932, sec. 19-2017; Kentucky: C.Cr.P. 1895, sec. 241; Minnesota: Gen. Stat. 1913, sec 8463; Montana: Rev. C. 1935, sec. 11988; Nevada: Rev L. 1912, sec. 7180; New Hampshire: P. St. 1891, c. 272, sec. 4; New York: C Cr. P. 1881, sec. 399; North Dakota: Comp. L. 1913, sec. 10841; Oklahoma: Comp. St. 1921, sec. 2701, Stats 1931 Sec. 3071; Oregon: Laws 1920, sec. 868, par. 4, code 1930, sec. 9-2001; Pennsylvania: St. 1860, Mar 31, sec. 49, Dig. 1920, sec. 7721; Puerto Rico: Rev. St. & C. 1911, sec. 6285, C. Cr. P. 1935, sec. 253; South Dakota: Rev. C. 1919, sec. 4882, Code 1939; Texas: Rev. C. Cr. P. 1911, sec. 801, Rev. P.C. 1925, sec. 718; Utah: Rev. St. 1933 sec. 105-32-18; Virgin Islands: Comp. C. 1920, Tit. III, c. 62, sec. 1 par. 4; Wyoming C. St. 1920, sec. 7522, Rev. St. 1931, sec. 33-816.

[6] *Burns 9-1603 - Who are competent witnesses.* The following persons are competent witnesses: Third. Accomplices, when they consent to testify. Indiana Acts 1905, ch. 169, sec. 235, p. 584.

[7] It is objected to the sufficiency of the evidence, that on material points there was only the testimony of Longley, an accomplice whose character was infamous. It is very true that the evidence of

been that an accomplice could testify only if he had never been judged guilty of a felony.[8] The theory that necessity justifies convictions based upon uncorroborated accomplice testimony is erroneous as there are numerous ways for governmental authority to establish procedures to test the truthfulness of a prospective accomplice-witness's claims and to thus create corroboration for every such witness and, in this manner, to use no uncorroborated accomplice testimony as was the practice and the due process requirement at common law as of the time of the adoption of the Bill of Rights. Indiana's present statute requiring only the consent of the accomplice witness is entirely proper in cases where corroboration exists. But the mere consent of the witness should not be sufficient where corroboration does not exist. The present practice of permitting convictions based upon accomplice testimony however inconsistent the prior statements of the accomplice may have been does not accord with the requirements of due process. Where as in this case, the accomplice or accomplices is/are uncorroborated and has/have made prior inconsistent statements, there is absolutely no basis for the trier of fact to determine beyond reasonable doubt that the accomplice's version of

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persons standing in such relation to each other should be carefully scrutinized by the Court and jury. Yet to exclude it altogether would often exclude the only means of disclosing guilt. For this reason, the revised statutes abolished the distinction which the pronouncing of judgment formerly made in regard to a witness that was infamous. 2 R.S. 1852, p. 80, and s. 243, p. 83. What before affected his competence under that enactment, goes only to his credibility. *Stocking v. State*, 7 Ind. 259 (326), 262, (330) (1855)

[8]It is objected that Peltz, having been convicted of burglary, was not a competent witness. But judgment and sentence had not passed against him; and it is the judgment of the Court and not the verdict of the jury, that renders the accused legally infamous, and, hence, incompetent as a witness. It is also urged that his testimony, being that of an accomplice, was not sufficient, uncorroborated, to authorize the jury to find a verdict of guilty. A jury may convict upon the testimony alone of an accomplice. *Dawley v. State*, 4 Ind. 128, 129 (1853)

events given at the trial should be chosen over his previously stated version of events. While it is perfectly proper in lawsuits for a trier of fact to discount a prior inconsistent unsworn statement of a non-felon witness in favor of the witness's present, sworn version, the propriety of such a practice cannot obtain where the witness is in the process of admitting to an infamous crime as serious as the crime of lying under oath.

The fact that the practice of permitting convictions upon uncorroborated accomplice testimony even where the accomplice has made prior, inconsistent statements is widespread (although definitely a minority view) does not mitigate against the merit of this cause. The frequency of the practice enhances the merits herein and demonstrates the seriousness and widespread social importance of the question herein presented.

CONCLUSION

The petitioner herein, as a criminal defendant, was convicted by uncorroborated-accomplice testimony and his conviction was upheld on appeal to the state court by an erroneous construction of petitioner's rights under the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States which was based upon an equally erroneous belief as to the rule at common law as of the time that the Bill of Rights was enacted.

WHEREFORE, Petitioner prays that this Petition For Writ of Certiorari be granted and that an appropriate writ be issued and upon review that this cause be reversed and remanded to the Indiana Supreme Court for further proceedings consistent with an appropriate opinion.

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APPENDIX

IN THE SUPREME COURT OF INDIANA

S. W. ASHER, Appellant,

v.

STATE OF INDIANA, Appellee.

[Filed Feb. 3, 1969]

No. 30854

APPEAL FROM MARION COUNTY CRIMINAL COURT, DIVISION NO. 2

Honorable Saul I. Rabb, Judge

ARTERBURN, J.

The appellant was charged by affidavit and found guilty of the crime of robbery. The only issue presented in appellant's brief is that "no reasonable man could find the appellant guilty on the evidence submitted to the jury". It is contended "that the only evidence against the defendant was the uncorroborated testimony of an alleged accomplice and such uncorroborated testimony was refuted by independent, unrebutted and unchallenged testimony on behalf of this defendant."

The evidence shows that the Burger Chef restaurant on South Madison in Indianapolis was robbed by two gunmen about 11:20 p.m. on April 26, 1964. None of the employees of the Burger Chef saw or heard the vehicle in which the two robbers came or in which they made their escape. The same night about 12:30 a.m. the police brought Robert U. Brown and Donnie Richey to the Burger Chef, where Brown was immediately identified by all three employees as one of the robbers. Brown implicated appellant Asher and his co-defendant, Oie Willoughby. Brown testified that Asher had approached him and suggested that they make some dishonest money together, and he introduced him to

Willoughby and together they discussed "scores" possibilities; that they drove around Indianapolis in a taxicab and looked at and discussed possible places for holdups.

The accomplice Brown testified that he, Asher and Willoughby decided they would rob the Burger Chef restaurant. Pursuant to this plan they left Brown's apartment between 10:00 p.m. and 10:30 p.m. on the night of the robbery and arrived at the restaurant between 10:30 p.m. and 11:00 p.m. Asher waited in the cab while Brown and Willoughby robbed the restaurant. After the robbery had been completed, Asher returned Brown and Willoughby close to Brown's apartment and let them out. About ten or fifteen minutes after Brown and Willoughby had arrived in the bedroom of Brown's apartment, Asher came in, helped divide the money taken in the robbery, and left about fifteen minutes later, which was around 12:00 p.m.

Corroborating evidence which appellant contends was "only minor corroboration" was given by a witness, Donnie Richey, who testified to substantially what Brown related occurred at Brown's apartment, namely, that Brown returned to his apartment about 12:00 p.m. on the night of the robbery; that Asher came in about ten minutes later and went into a bedroom where Brown and Willoughby were. They stayed about fifteen minutes and left, and while they were in the bedroom he heard what sounded like the handling of a considerable amount of money and change. According to Brown's testimony they divided the money three ways in his apartment, and he got $317.00.

The appellant attempts to get us, as a court of appeals, to disregard the testimony of an accomplice or, in the alternative, consider the evidence of Brown as "inherently improbable and runs counter to human experience."

It has long been the law in Indiana that the testimony of an accomplice, if otherwise competent as a witness, may be accepted by the jury and believed, and in such event is sufficient evidence for conviction.

Fitzgerald v. State, ___ Ind. ___, 219 N.E.2d 603 1966);
Mavrick v. State, 247 Ind. 77, 210 N.E.2d 426 (1965)
Couch v. State, 246 Ind. 531, 207 N.E.2d 365 (1965);
Smith v. State, 241 Ind. 601, 174 N.E.2d 47 (1961).

Burns' Indiana Stat. Anno. §9-1603 provides specifically that "accomplice, when they consent to testify" are competent witnesses. Once a witness had been found to be competent, the amount of weight to be given the testimony is one for the jury or the trier of the facts, and not for this appellate court. As stated by Judge Emmert in *Kraus v. Kraus*, 235 Ind. 325, 328, 132 N.E.2d 608, 610 (1956):

> "When an issue concerning the credibility of witnesses or the weight of the evidence is presented for our determination on appeal, we should clearly avoid any tendency to place ourselves upon the trial bench and usurp the functions of the trial judge. We are dealing with a cold record and cannot observe the witnesses, their conduct, and manner of testimony while on the witness stand."

This rule is applicable both in civil and criminal cases. In *Jackson v. State*, 194 Ind. 561, 562, 143 N.E. 625 (1924) this Court said:

> "Questions as to the credibility of witnesses, and as to what inferences shall be drawn from the facts proved are for the jury and the trial court, and if part of the evidence, standing alone, would justify a finding of guilty, this court cannot set aside the verdict of guilty because of other evidence to the contrary.

This was further supported by the statement in the case of *Hammond v. State*, 200 Ind. 343, 344, 163 N.E. 262, 263 (1928): "It was the duty of the jury to determine if this witness told the truth in the trial under consideration."

In addition to the testimony of the accomplice in this case, the jury also heard a corroboration of that testimony

by Donnie Richey, which also tended to show the guilt of the accused. The conflicting testimony was presented to the jury, and as a result of their weighing the evidence the conclusion of guilt was reached. On appeal we look only to the evidence most favorable to the state to see if there is enough evidence to support the conviction, which in this case there plainly is. For an appellant court to go beyond this role is an invasion of the function of the trial court.

The judgment of the trial court is affirmed.

DE BRULER, C.J. and HUNTER and GIVAN, JJ. CONCUR.
JACKSON, J. DISSENTS WITH OPINION.

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IN THE

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OCTOBER TERM, [redacted] 1969

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ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1409

S. W. ASHER,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The majority and dissenting opinions of the Indiana Supreme Court have been reported: Asher v. State, 244 N.E. 2d 89 (1969).

JURISDICTIONAL STATEMENT

Respondent concurs in the jurisdictional statement set forth in the petition for writ of certiorari.

QUESTION PRESENTED

Whether petitioner's conviction for armed robbery, when based upon the testimony of his co-robber which was cor-

roborated by a disinterested witness to the division of the loot, violated petitioner's right to procedural due process of law guaranteed by Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent concurs in the statement of Constitutional Provisions Involved set forth in the petition for writ of certiorari, with this addition: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor,* and to have the Assistance of Counsel for his defence." Sixth Amendment, Constitution of the United States (emphasis added).

STATEMENT OF THE CASE

Shortly after 11 p.m. on April 26, 1964, two armed men held up a Burger Chef restaurant in Indianapolis, Indiana (Tr. 154-63, 176-79, 193-98). Shortly thereafter, about 12:30 a.m., an Indianapolis police detective arrested a man named Ralph Brown and an 18-year-old boy named Donnie Richey, who were together on Virginia Avenue, because Brown matched a broadcast description of one of the robbers given by the Burger Chef employees to the police (Tr. 253-55). Brown voluntarily returned (Tr. 295-96) to Burger Chef, where three employees identified him as one of the holdup men (Tr. 163, 175, 199-200, 366-67). Brown was then arrested and taken to police headquarters (Tr. 366-67). There Brown said he was an escapee from Michigan State Prison, admitted the robbery, and implicated petitioner (Tr. 368).

On April 29, 1964, petitioner was arrested, a signed statement implicating petitioner was taken from Brown, and this statement was read to both men while in each other's presence (Tr. 369-71).

Brown, worried by a possible life sentence as a Habitual Criminal, pled guilty and received a ten-year sentence (Tr. 273, 299-300). At petitioner's trial following his not-guilty plea, Brown testified at length concerning petitioner's participation in the holdup (Tr. 274-95). According to Brown, petitioner formulated the robbery scheme (Tr. 275), selected the victim (Tr. 280, 309-15), drove the get-away vehicle (Tr. 288-293), and shared in the robbery proceeds at Brown's apartment on Virginia Avenue (Tr. 294-95).

Donnie Richey testified. In addition to corroborating the testimony about Brown's apprehension, identification, and arrest (Tr. 214-16), Richey testified that he was in Brown's Virginia Avenue apartment at the time of the robbery (Tr. 209). About midnight, that is, about a half-hour after the robbery, Brown returned; ten minutes later Richey admitted petitioner, who said "he wanted to see Brown," to the apartment (Tr. 212). Then, Richey testified, the petitioner, Brown, and a third man went into the next room: "The three of them, Sam [petitioner], Willoughby and Brown were in the bedroom. While I listened to the radio I could hear the sound of change. It sounded like there was a lot. By change I mean money. They were in the bedroom fifteen minutes, and then Asher [petitioner] and Willoughby left." (Tr. 213-14).

The jury convicted petitioner and he was sentenced to go to jail. Petitioner appealed, stating in his reply brief filed with the Indiana Supreme Court that "the Appellant's sole argument in this case is that no reasonable man could have found the Appellant guilty on the

evidence submitted to the Jury." (p. 1). Petitioner lost his appeal, *Asher v. State*, 244 N.E. 2d 89 (1969). Petitioner now seeks a writ of certiorari from this Court, apparently under the impression that his conviction resulted from the wholly-uncorroborated testimony of his accomplice, according to his petition (p. 2). Petitioner further argues, and this for the first time at any stage of the proceedings, that a conviction so obtained violates petitioner's right to procedural due process of law guaranteed him by the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT AGAINST GRANTING THE WRIT

I.

Petitioner's conviction was not the result of the wholly-uncorroborated testimony of his accomplice, and therefore the question presented in the petition for writ of certiorari is unripe for review by this Court.

This part of respondent's argument is directed to the facts which appear in the record. Petitioner's framing of the "question presented" assumes that he was convicted on the wholly-uncorroborated testimony of his accomplice, Ralph Brown. As the numerous references to Richey's corroborative testimony in respondent's statement of the case demonstrate, this assumption is incorrect. Moreover, Petitioner stated in his reply brief before the Indiana Supreme Court: "Appellant in his brief conceded that as a general rule the defendant may be convicted on the uncorroborated testimony of his accomplice, (Appellant's Brief, pages 146 and 147) and that there was some minor corroboration of the accomplice, Ralph Brown, by Ralph Brown's teen-age boyfriend, Donnie Richey. (Appellant's Brief, page 139)." [Parends in the original].

Richey's testimony corroborates petitioner's accomplice, Brown, in two important respects: 1. Richey's testi-

mony, like Brown's, also places petitioner in Brown's apartment about one-half hour after the robbery occurred. 2. Richey testified that after he admitted the petitioner to Brown's apartment, the petitioner, Brown, and a third man went into the bedroom, where Richey overheard them dividing the proceeds of the robbery. This is in substantial accord with the account of the event given at the trial by the accomplice, Brown. This is why petitioner cannot now argue that his conviction resulted from the wholly-uncorroborated testimony of petitioner's accomplice. Further, this corroborative testimony demonstrates why the issue — whether a criminal conviction based upon the wholly-uncorroborated testimony of the defendant's accomplice violates the defendant's procedural due-process-of-law guarantees under the Fourteenth Amendment to the Constitution of the United States — is particularly unripe for review by this Court under the facts of this particular case.

II.

Petitioner may not raise in this Court, for the first time in these proceedings, an issue of procedural due process under the Fourteenth Amendment to the Constitution of the United States when there was ample opportunity for petitioner to raise the issue in the state courts below.

An examination of the petition for writ of certiorari in this case discloses a departure from the requirements of U. S. Sup. Ct. Rule 23 (f), 28 U.S.C., which provides:

> If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such

> pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

The reason why petitioner's statement of the case in his petition does not specify: (1) the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised, and (2) the way in which they were passed upon by the court, so as to give this court jurisdiction to review the judgment on writ of certiorari, is because these events never took place.

Subsequent to his conviction, petitioner filed a seven-point motion for new trial, see 244 N.E. 2d 93; nowhere did the motion mention petitioner's Federal Constitutional guarantees or their violation by the manner in which petitioner's guilt was eventually determined. More important, the question of petitioner's guilt was briefed and argued in the Indiana Supreme Court in the apparel of a sufficiency-of-evidence question, not the full-blown panoply of a deprivation of procedural due process of law guaranteed by the Constitution of the United States. Even the lone dissent favoring petitioner below, 244 N.E. 2d 89, 93, gave no indication that a federal question was either presented, argued, or considered. As pointed out earlier, petitioner himself told the Indiana Supreme Court: "The Appellant's sole argument in this case is that no reasonable man could have found the Appellant guilty on the evidence submitted to the Jury." (Appellant's reply brief, p. 1.).

The most succinct response to a record in this state of disarray is Mr. Justice Harlan's, writing for this Court in

Ellis v. Dixon, 349 U.S. 458, 460 (1954): "The question of whether the regulations are unconstitutionally vague was not raised below, and hence is not open here." *Cf. Brown v. Allen*, 344 U.S. 443, 480 (1952).

Last, petitioner's failure to raise the issue below makes it difficult to utilize the prime consideration for issuing a writ of certiorari recommended by U. S. Sup. Ct. Rule 19.1(a), 28 U.S.C.: "Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court." The two Indiana courts below which considered petitioner's cause neither decided nor declined to decide his Federal Constitutional claim—it was never presented to them, though petitioner was represented by counsel throughout.

III.

This Court has already upheld, by implication, the principle that a criminal conviction based upon an accomplice's testimony does not violate the defendant's Federal due process guarantees if surrounded by proper procedural safeguards for their protection.

The possible Constitutional problems posed by a state's use of an uncorroborated accomplice's testimony to obtain a criminal conviction have been before this Court before. This was the fact situation posed by *Cash v. Culver*, 358 U.S. 633 (1959). Petitioner had been convicted of burglary in a Florida state court on the basis of an uncorroborated accomplice's testimony. On petitioner's appeal from an unsuccessful habeas corpus proceeding, this Court held that the deprivation of due process occurred not in the method by which the conviction was obtained, but rather in the fact that petitioner was without counsel. After noting that the petitioner was left to conduct his own defense, Mr. Justice Stewart wrote: "It is not clear what, if any, objections

were made to Allen's [the accomplice's] testimony, or whether he was cross-examined. . . . The Florida decisions also establish the right to cross-examine an accomplice witness as to whether he is testifying under an agreement for leniency, and even as to whether he believes that his testimony will be in his best interest. [citations omitted] A layman would hardly be familiar with these rights." 358 U.S. 633, 636-38. *Cf. Napue v. Illinois,* 360 U.S. 264 (1959).

The lack of procedural safeguards surrounding the use of an accomplice's testimony, which disturbed this Court in *Cash v. Culver, supra,* are not present in the instant case. First, this petitioner was represented by counsel throughout. But more important, the very safeguard urged by Mr. Justice Stewart was respected here: The petitioner's accomplice, Brown, was asked on cross-examination whether he was testifying under an agreement for leniency, and Brown replied, "I did not make any deal with the Prosecutor to testify against Willoughby or Asher [petitioner]" (Tr. 299-300). And not only once; later in his cross-examination, Brown testified, "They never made no deal. They never told me what to say." (Tr. 353).

Finally, any objection to the use of accomplice testimony on the basis of a historical perspective of the common law as it existed when the Bill of Rights was enacted, as is suggested by petitioner's statement of the question presented, was swept away by this Court's opinion in *Washington v. Texas,* 388 U.S. 14 (1967). The analysis revolves around the incorporation of the Sixth Amendment's guarantees (not the Fifth Amendment, as petitioner states) into the due-process-of-law guarantees of the Fourteenth Amendment.

The issue in *Washington v. Texas, supra,* was whether a defendant in a state criminal proceeding could *compel* the favorable testimony of an accomplice witness, notwith-

standing two state statutes forbidding such testimony. Mr. Chief Justice Warren, writing for a unanimous Court, held the defendant had this right. The Court's opinion first noted that the common-law prohibition against the use of accomplice testimony in the lower Federal Courts, as a matter of the administration of Federal criminal justice, had been abolished by the Court long ago, citing *Rosen v. United States,* 245 U.S. 467 (1918). The Chief Justice then reasoned on to a two-point conclusion: First, the *Rosen* holding really rested upon the Sixth Amendment's right to obtain witnesses in one's favor; second, that this right was available to a state criminal defendant, state statutes to the contrary notwithstanding, by virtue of its incorporation into the Due Process Clause of the Fourteenth Amendment. Mr. Justice Harlan concurred in the result on the theory that "In my view the Due Process Clause is not reducible to 'a series of isolated points,' but is rather 'a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints. . . .' [citations omitted]." 388 U.S. 14, 24.

The Sixth Amendment also gives a defendant "the right * * * to be confronted with the witnesses against him. . . ." If it is true that defendant may *compel* the favorable testimony of accomplice witnesses, *Washington v. Texas, supra,* then he should confront the unfavorable accomplice witness's testimony against him, for the reason quoted by Mr. Chief Justice Warren in *Washington v. Texas, supra*: "'[T]he truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court. . . .' *Rosen v. United States,* 245 U.S. 467, 471." 388 U.S. 14, 22. This result would allow respondent to retain what Mr. Justice Cardozo vouchsafed it in another context many years ago: "A

reciprocal privilege, subject at all times to the discretion of the presiding judge [citation omitted] has now been granted to the state. There is here no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before." *Palko v. Connecticut,* 302 U.S. 319, 328 (1937).

CONCLUSION

Wherefore Respondent prays that the petition for writ of certiorari to the Supreme Court of Indiana be denied.

Respectfully submitted,

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